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In the Supreme Court of the United States

OCTOBER TERM, 1991

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO, PETITIONER

v.

MARTIN R. SHUGRUE, JR., CHAPTER 11 TRUSTEE FOR EASTERN AIR LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Section 1113 of the Bankruptcy Code, 11 U.S.C. 1113, provides the exclusive means for a debtor to terminate or modify a collective bargaining agreement. The question presented in this case is whether Section 1113 prohibits a bankruptcy court from staying, under 11 U.S.C. 362(a), an action in another court brought by a labor union to enforce the terms of a collective bargaining agreement.

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This brief is submitted in response to this Court's order of May 13, 1991, inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. On March 4, 1989, the Air Line Pilots Association International (pilots' union) and two other unions began a strike against Eastern Airlines, Inc. (Eastern). Pet. App. 88a. On March 9, 1989, Eastern and its affiliate, Ionosphere Clubs, Inc., filed voluntary petitions under Chapter 11 of the Bankruptcy Code in the United States District Court for the

Southern District of New York. *Ibid.* To meet published flight schedules, Eastern leased aircraft and crews from Continental Airlines. Pet. App. 89a.[1] Such lease arrangements are known in the airline industry as "wet-leases." *Ibid.*

In September 1989, the pilots' union filed a complaint against Eastern in the United States District Court for the Southern District of Florida. The complaint alleged that the wet-leases violated the terms of the collective bargaining agreement between Eastern and the pilots' union. Pet. App. 89a-90a. As relief, the complaint sought an injunction against Eastern's continued use of wet-leases and damages for Eastern's breach of the contract. *Id.* at 40a-41a.

In response, Eastern brought an action in the bankruptcy court to enjoin the pilots' union from prosecuting its action in the Southern District of Florida. Eastern argued that the Florida action violated the automatic bankruptcy stay of 11 U.S.C. 362(a).[2] Pet. App. 90a-91a.

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[1] At that time, the estate was operated by the debtor-in-possession. See 11 U.S.C. 1107(a). On April 19, 1990, Martin R. Shugrue, Jr., was appointed trustee of the bankruptcy estate.

[2] Section 362(a) limits the types of actions that can be taken, or continued, against the debtor and the debtor's property after it files for bankruptcy. It provides that the filing of a bankruptcy petition automatically stays: the commencement or continuation of judicial or administrative proceedings against the debtor that were or could have been commenced pre-petition, or which seek to recover on a claim that arose pre-petition, 11 U.S.C. 362(a)(1); the enforcement of a pre-petition debt or pre-petition judgment against the debtor, 11 U.S.C. 362(a)(2) and (6); "any act to obtain possession

2. On October 4, 1989, the bankruptcy court entered a permanent injunction prohibiting the pilots' union from prosecuting the Florida action. Pet. App. 102a-104a. It held that the Florida lawsuit violated the bankruptcy stay because the suit would obstruct the debtor's reorganization by "controlling the manner in which it uses its assets." See *id.* at 100a; see also 11 U.S.C. 363(a)(3).

3. The pilots' union appealed the bankruptcy court's ruling to the district court under 28 U.S.C. 158(a). It also appealed a second bankruptcy court order staying the arbitration of a union grievance. Pet. App. 30a-31a.

On April 9, 1990, the district court reversed both bankruptcy court orders. Pet. App. 60a-71a, 85a. First, the district court held that the stay of the arbitration proceeding was improper. Section 1113(f) prohibits using the bankruptcy stay provisions (or any other Code provision) "to unilaterally terminate or alter" a labor contract. A stay of the arbitration proceedings would have allowed Eastern to nullify the term of the collective bargaining agreement requiring the arbitration of grievances. The stay was therefore improper under Section 1113(f). Pet. App. 71a-74a.

Second, the district court held that the stay of the Florida wet-leasing suit was improper. It reasoned that Section 1113 rendered the automatic stay inap-

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of the property of the estate * * * or to exercise control over property of estate," 11 U.S.C. 362(a)(3); the creation, perfection, or enforcement of a lien, 11 U.S.C. 362(a)(4)-(5); setting-off a pre-petition debt against any claim against the debtor, 11 U.S.C. 362(a)(7); and the commencement or continuation of a proceeding in the Tax Court concerning the debtor, 11 U.S.C. 362(a)(8). Section 362(b) sets out a list of proceedings and actions that are exempt from the stay.

plicable to suits to enforce collective bargaining agreements. Pet. App. 66a-68a. It also held that a stay was not authorized by 11 U.S.C. 105(a), which empowers the bankruptcy court to "issue any order * * * that is necessary to carry out the provisions of this title." Since neither party had presented the issue of the legality of the wet-leasing practice to the bankruptcy court, that court did not need to enjoin the Florida action to protect its own jurisdiction. Pet. App. 81a-83a.

4. Eastern appealed the district court's ruling to the Second Circuit. Pet. App. 4a, 6a-7a. The court of appeals summarized the issue presented by the appeal:

> This appeal raises the question of the effect of § 1113 of the Bankruptcy Code on the application of the automatic stay provisions of § 362 of the Bankruptcy Code to non-bankruptcy proceedings to enforce a collective bargaining agreement. ***

Id. at 7a.

In the court of appeals' view, the purpose of Section 1113 is to ensure "that a collective bargaining agreement remain in effect and that the collective bargaining process continue after the filing of a bankruptcy petition unless and until the debtor complies with the provisions of § 1113." Pet. App. 9a-11a. The court held that Section 1113(f) should be construed "quite literally" to prohibit the application of other Code provisions only if such application would effect a unilateral modification or termination of a collective bargaining agreement. Pet. App. 11a-12a.

Under the court of appeals' approach, Section 1113 did not in all cases preclude application of the automatic stay provision to disputes over collective bar-

gaining agreements. Pet App. 12a. In support of that conclusion, the court noted that when Congress passed Section 1113, it added two exceptions to the automatic stay, but did not provide an exception for disputes arising out of collective bargaining agreements. Pet. App. 12a. The court concluded that a case-by-case approach is necessary to determine whether a particular application of the stay conflicts with Section 1113, *i.e.*, whether a stay would in effect modify or terminate a collective bargaining agreement.

The court of appeals affirmed the district court's order vacating the stay of the arbitration proceeding. Pet. App. 22a-23a. The court of appeals agreed with the district court that the stay of arbitration was improper because it effectively nullified the labor contract's clause requiring arbitration. *Id.* at 14a-15a.

At the same time, the court of appeals reversed the district court's order vacating the bankruptcy court's stay of the Florida wet-lease action. A stay of a lawsuit to enforce a collective bargaining agreement, the court of appeals said, does not necessarily conflict with Section 1113. If the bankruptcy court could not hear the dispute, it would have to lift the stay and allow the union to sue elsewhere. But if the bankruptcy court could hear the union's contract action, nothing in Section 1113 barred the bankruptcy court from staying the union's suit against the debtor in another court. Pet. App. 16a-18a.

In this case, the stay was proper because it did not modify or terminate the collective bargaining contract, but merely required the union to enforce the contract in the bankruptcy court. The court of appeals remarked that the wet-leasing dispute was within the bankruptcy court's core jurisdiction because its determination would affect the administra-

tion of the estate. Pet. App. 19a-20a. The court further remarked that the district court would not be required to withdraw the dispute from the bankruptcy court under 28 U.S.C. 157(d), because its adjudication required only a routine application of a non-bankruptcy federal statute. Pet. App. 20a-21a.[3] Since the bankruptcy court could stay the Florida wet-lease action consistent with Section 1113, the court remanded the case to the district court for further consideration of the wet-lease decision and whether the bankruptcy court was prohibited by the Norris-LaGuardia Act from enjoining the Florida action. Pet. App. 22a-23a.

Judge Miner dissented from the court's decision with respect to the wet-lease action. He said that since neither party brought the wet-lease dispute before the bankruptcy court, there was no need for a stay to protect the bankruptcy court's jurisdiction. Pet. App. 26a-27a.

DISCUSSION

Only the first of the three questions presented by the pilots' union is properly presented by the petition. That question is: To what extent does 11 U.S.C. 1113 (which governs modification and rejection of collective bargaining agreements) abridge 11 U.S.C.

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[3] 28 U.S.C. 157(d) provides:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

362(a) (which automatically stays certain actions against the debtor and the debtor's property when a bankruptcy petition is filed). Since that question is one of first impression, there is no circuit conflict and therefore no need for this Court to intervene to ensure the uniformity of the law.

Nor is resolution of the question presented necessary for proper disposition of this case. The district court on remand might find that Section 362(a) does not even operate to stay the Florida wet-lease action, which would make the controversy over the application of Section 1113 moot. Alternatively, Eastern might remove or transfer the Florida action to New York using other provisions. There is no compelling need for this Court's review at this time.

1. The only issue squarely presented by the petition is the extent to which 11 U.S.C. 1113 limits the scope of the automatic stay provision, 11 U.S.C. 362(a). The pilots' union does not contend that there is a circuit conflict regarding Section 1113's relationship to Section 362. Pet. 12-20. Indeed, the Second Circuit is the first and only court of appeals to have addressed the issue.

a. In 1984, this Court ruled that a bankruptcy trustee can unilaterally terminate a collective bargaining agreement. See *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1984). In so holding, the Court primarily relied on 11 U.S.C. 365(a), which generally furnishes the bankruptcy trustee with the option of whether or not to assume an executory contract. The Court held that a collective bargaining agreement is an executory contract under Section 365(a), and that the bankruptcy trustee can unilaterally terminate a collective bargaining agreement if he makes a reasonable effort to negotiate a voluntary modification and the bankruptcy court—taking into account the rele-

vant equities and hardships—finds that rejection of the agreement would facilitate a successful reorganization. See 465 U.S. at 521-527. The Court said that, under Section 362(g) of the Code, any claim arising from a trustee's rejection of an executory contract may be asserted only as a claim in bankruptcy. 465 U.S. at 530.

Congress reacted swiftly to the *Bildisco* decision. Five months after the decision was issued, Congress added Section 1113 to the Bankruptcy Code. See Pub. L. No. 98-353, § 541(a), 98 Stat. 390; see also Rosenberg, *Bankruptcy and the Collective Bargaining Agreement—A Brief Lesson in the Use of the Constitutional System of Checks and Balances*, 58 Am. Bankr. L.J. 293, 312-321 (1984) (examining the legislative history of Section 1113). Section 1113 permits a bankruptcy court to approve a trustee's proposal to reject a collective bargaining agreement only if certain procedures are followed and certain criteria are met. Among those criteria are that the trustee's proposal be "necessary" for the reorganization and that the "balance of the equities clearly favors rejection of [the] agreement." See 11 U.S.C. 1113(b)-(c). Section 1113 further provides that "[n]o provision of [the Bankruptcy Code] * * * shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section." See 11 U.S.C. 1113(f).

b. The parties' disagreement over the effect of Section 1113 is narrow. The parties agree that Section 1113 is the exclusive means for the trustee or debtor-in-possession to modify or terminate the debtor's obligations under a collective bargaining agreement. The parties also agree that the automatic stay provision of 11 U.S.C. 362(a) may not be applied "to

unilaterally terminate or alter" a collective bargaining agreement—Section 1113 is the exclusive means for achieving that end. See Pet. 12-14; Br. in Opp. 27-29. The only disagreement is whether a stay of an action to *enforce* a collective bargaining agreement "unilaterally terminate[s] or alter[s]" a collective bargaining agreement in violation of Section 1113(f). See Pet. 15-20.

The Second Circuit read Section 1113(f) literally: other Bankruptcy Code provisions cannot be construed to permit the trustee "to unilaterally terminate or alter" any provision of a collective bargaining agreement. Pet. App. 11a-12a. The court of appeals said that in deciding whether the bankruptcy court could enforce the automatic stay, it would examine, on a case-by-case basis, whether the stay would modify any provision of a labor contract. *Id.* at 12a-14a. Since staying the arbitration proceeding would allow the trustee to avoid the contract's arbitration clause, the court held that enforcing such a stay would violate Section 1113. Pet. App. 14a-16a. With regard to the wet-lease suit, however, the court of appeals said that the stay did not terminate or alter the contract. Although the stay forced the union to bring its suit to the bankruptcy court, it did not render the wet-lease provisions of the collective bargaining agreement unenforceable and thus did not terminate those provisions. Accordingly, the court held that the stay of the union's wet-lease suit was not barred by Section 1113. Pet. App. 16a-18a.

c. The pilots' union suggests that the Second Circuit erred in employing a case-by-case approach, and argues that the court of appeals should have adopted a *per se* rule instead. The correct rule, according to the union, is that Section 362 cannot be applied to labor contract disputes. See Pet. 15-20. The union's

proposal is not grounded in the text or history of Section 1113.

Section 1113 precludes the use of other Code provisions to permit a trustee "to unilaterally terminate or alter" any provision of a collective bargaining agreement. 11 U.S.C. 1113(f). As the Second Circuit explained, not every application of the automatic stay to a labor contract dispute will have that effect. If Congress had meant to exempt labor contract disputes from the automatic stay provision, it had the perfect opportunity to do so when it added Section 1113. In the same legislation that added Section 1113, Congress added several exemptions to the automatic stay for certain kinds of proceedings against the debtor. It did not, however, exempt labor contract disputes. Since the Second Circuit has addressed a question of first impression in the courts of appeals, and has given an answer that is not obviously incorrect, it would be premature for this Court to grant review.

2. An additional reason for denying the petition is that the proceedings on remand to the district court could moot the question of the effect of Section 1113 on Section 362(a).

a. There are open arguments that the Florida action is not subject to the automatic stay, quite apart from the effect of Section 1113. First, the automatic stay provision does not require all actions against the debtor (and the debtor's property) to be brought in the bankruptcy court. Since the union's action arose post-petition it is not stayed under Section 362(a)(1), and, unless it is otherwise stayed, it need not be brought before the bankruptcy court. See 28 U.S.C. 959, 1409(e) (post-petition claims arising from the administration of the estate may be brought to any state or federal court that could hear the dispute under nonbankruptcy venue provisions). Even if the

injunctive relief sought by the union could be stayed under Section 362(a)(3) as an act to exercise control over the debtor's property (but see *Penn Terra Ltd.* v. *Dep't of Environmental Resources*, 733 F.2d 267, 274-278 (3d Cir. 1984)), that aspect of the Florida action has now become moot since Eastern has terminated operations. The only live controversy still pending in Florida appears to be the union's damage claim for breach of contract. It is quite likely that the damage aspect of the union's claim would not be stayed by either Section 362(a)(1) or Section 362(a)(3). See *United States* v. *Inslaw*, 932 F.2d 1467, 1473 (D.C. Cir. 1991). If no Section 362(a) stay bars prosecution of the wet-lease action, then the effect of Section 1113 on the bankruptcy stay is irrelevant.

Second, the Second Circuit instructed the district court on remand to determine whether the anti-injunction provisions of Norris-LaGuardia Act, 29 U.S.C. 101, 104, 107-108, bar a stay of the Florida action. See Pet. App. 22a. That issue was one of the union's primary arguments on appeal. See Pet. C.A. Br. 32-40. If the pilots' union is correct that a stay would violate the Norris-LaGuardia Act, then the Section 1113 issue presented by this petition is again irrelevant to the proper disposition of this case.

b. There are other unaddressed provisions that may cause the transfer or removal of the wet-lease action from Florida to New York even if the backruptcy court may not enforce the automatic stay. Even if the pilots' union is correct that Section 1113 allows it to sue in the Southern District of Florida without violating the stay (or if the stay does not apply for other reasons), the trustee may still be able to force the union to litigate the matter in the backruptcy court. Under 28 U.S.C. 1452(a), the trustee can re-

move any claim or cause of action (subject to exceptions not applicable here) from any other court to the district court where the bankruptcy was filed—here the Southern District of New York—as long as the matter is within the latter district court's jurisdiction under 28 U.S.C. 1334. The wet-lease action is within the New York district court's Section 1334 jurisdiction since it is at minimum "related" to a case under Title 11. See 28 U.S.C. 1334(b). Thus, Eastern's trustee may, notwithstanding the issues presented by the petition, be able to remove the union's action to the Southern District of New York simply by filing a timely removal application with the bankruptcy court. See 28 U.S.C. 1452(a); Bankr. R. 9027(a)(1); 1 *Collier on Bankruptcy* ¶ 3.01[5][c], at 3-92 (15th rev. ed. 1991).

The action would then be automatically removed to the United States District Court for the Southern District of New York which then (by way of a standing order) would refer the matter to its adjunct, the bankruptcy court. See *In re Watson-Mahaney, Inc.*, 70 Bankr. 578 (Bankr. N.D. Ill. 1987) (removal is automatic); 28 U.S.C. 157(a) (referral authority).[4] And even if Section 1452 did not allow automatic removal of the Florida action to the bankruptcy court, the trustee could still attempt to transfer the Florida action to the Southern District of New York in the interest of justice or for the convenience of the parties. See 28 U.S.C. 1404, 1412.

Because this Court's intervention is not required to resolve a conflict among the circuits on the meaning of Section 1113, or to correct a clearly erroneous in-

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[4] If the case is removed to the bankruptcy court, the pilots' union could then seek a remand back to the Southern District of Florida. See 28 U.S.C. 1452(b).

terpretation of that Section necessary to the proper disposition of this case, the petition should be denied.

3. The pilots' union argues that this Court should grant review to address the hypothetical question whether the bankruptcy court could hear the labor contract action within its "core" jurisdiction. See 28 U.S.C. 157(b). That issue simply is not raised by this case in its present posture. The court of appeals held only that the bankruptcy court was not barred from staying the wet-lease dispute in the Florida district court. That holding did not require resolution of the question whether the bankruptcy court *could* hear the dispute itself as a core proceeding. If the union files its labor contract claim in the bankruptcy court, the nature of the bankruptcy court's jurisdiction can be properly litigated at that time.

The Second Circuit mistakenly believed that it was important to decide whether the wet-lease dispute was a core matter. Pet. App. 16a-22a. The court of appeals seemed to believe that if the wet-lease action was not within the bankruptcy court's core jurisdiction, a stay of the Florida action would violate Section 1113 since the trustee could ignore (and therefore effectively terminate) that aspect of the labor contract. Pet. App. 18a. But whether the labor contract dispute would be a core or non-core proceeding does not affect the union's power to litigate the matter in the bankruptcy court. The "core" or "non-core" designation affects only the scope of the district court's review of the bankruptcy court.[5] See

[5] In "core" proceedings, the bankruptcy judge may adjudicate and enter final orders subject to appellate style review by the district court—*i.e.*, *de novo* review on issues of law, clearly erroneous review on questions of fact. See 28 U.S.C. 157(b)(1), 158(a); Bankr. R. 8013. In "non-core" matters, absent consent of the parties, the bankruptcy judge may only

28 U.S.C. 157(b)-(c)(1). Even if the wet-lease suit were "non-core," the pilots' union would still be able to enforce its contractual rights in New York if the Florida action were stayed. In deciding the preclusive effect of Section 1113, it does not matter whether the proceeding would be core or non-core, or what role the bankruptcy court would have. Even if the Florida action were stayed, the pilots' union could vindicate its rights by filing an action in the bankruptcy court for the Southern District of New York.

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submit recommended findings to the district court, which then enters final judgment after reviewing *de novo* matters as to which a party has objected. 28 U.S.C. 157(c)(1).

The core/non-core distinction reflects Congress's decision, in restructuring the bankruptcy court system in 1984, to return bankruptcy judges to their pre-1978 role as "bankruptcy referees." See *In re Bertoli*, 812 F.2d 136, 139 (3d Cir. 1987); see also 130 Cong. Rec. 20,227 (1984) (Rep. Kastenmeier). Under the Bankruptcy Amendments and Federal Judgeships Act of 1984, bankruptcy judges have no jurisdiction of their own. The district court possesses original jurisdiction of all matters arising in and related to a bankruptcy case. See 28 U.S.C. 1334. The bankruptcy judges sit as "unit[s]" of the district court, only hearing matters referred to them by the Article III court. See 28 U.S.C. 151, 157(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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